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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass. 3/F

425 I Street N.W.

Washington, D.C. 20536



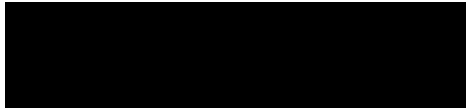
File

Office: California Service Center

Date:

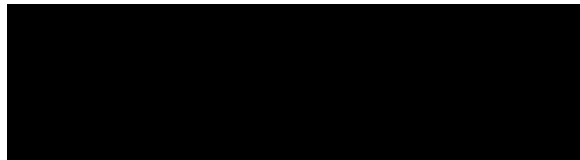
MAR 11 2004

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the appeal will be remanded to the director for entry of a new decision.

The petitioner is a medical nursing service. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute and regulations, two uncertified Forms ETA 750, Application for Alien Employment Certification, accompany the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel asserts that the director erred in basing its decision on the 2001 tax return instead of the 2002 return, which shows that the petitioner had the ability to pay the proffered wage as of the date of filing the petition.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petitioner's priority date, which is the date the petition, accompanied by the required evidence, is received at the CIS service center, and continuing until the alien is granted permanent residence. The petitioner's priority date in

this instance is June 25, 2002. The beneficiary's salary as stated on the labor certification is \$29.00 per hour or \$60,320 per year.

With the petition, counsel submitted a statement from petitioner's managing director stating the financial statements were not available but that the company was "fully operational and solvent."

In a request for evidence (RFE) dated October 25, 2002, the director requested evidence of the petitioner's ability to pay the proffered wage and copies of the petitioner's 2001 federal tax return and payroll summary. In response, counsel submitted an unaudited financial report for the period July 2001 through June 2002, the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, the petitioner's 2001 Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return, and Form 941, Employer's Quarterly Federal Tax Return. The Form 1120 reflects that the petitioner was incorporated on July 1, 2001 and had taxable income before net operating loss deduction and special deductions of negative \$37,301.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage from the time the priority date was established to the present.

On appeal, counsel states that since the petition was filed in June 2002, the relevant financial documentation that should be considered is for fiscal year 2002. Counsel asserts that the beneficiary's employment will also cause the petitioner's income to increase.

With the appeal, counsel submitted a brief, a copy of the petitioner's federal tax return for the year 2002, and a copy of a statement from the Bank of America indicating the petitioner has a \$10,000 line of credit, which counsel asserts could be used to pay the proffered wage.

Although counsel states that the beneficiary's employment will cause an increase in petitioner's income, she submits no evidence that this increase in income will be adequate to pay the proffered wage. The assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, even if evidence was provided by the petitioner to corroborate counsel's assertions, evidence would also be required that would illustrate the petitioner's expenses to employ the beneficiary. Further, CIS will not consider a line of credit as an asset to be used to pay the proffered wage, as it constitutes borrowing, a

liability, and further demonstrates the petitioner's inability to pay the wage.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

Counsel is correct that the petitioner need only establish its ability to pay from its priority date, which is June 25, 2002. Thus, only the petitioner's evidence of the year 2002 is relevant.¹ The petitioner's tax return for calendar year 2002 shows taxable income before net operating loss deduction and special deductions of \$45,732, less than the proffered wage. The return also reflects current assets of \$194,437 and current liabilities of \$92,899. The petitioner could have paid the proffered wage from current net assets.

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted demonstrates that the petitioner was able to pay the proffered wage during 2002.

However, beyond the decision of the director, an issue has arisen on appeal. Counsel asserts that the petitioner has been a viable operation for six years. However, counsel submitted no evidence of the company's financial operations for those six years. The tax returns submitted on the petitioner's behalf show that it was incorporated in 2001 with an employer identification number (EIN) of 94-3402209. The name on the tax return is "Medical Link Providers II, Inc." On the petitioner's visa petition, its name is "Medical Link Providers, Inc.," its EIN is 94-3280020, and its date of establishment is 1997. The supporting documents illustrate incorporation and licensure in 2001. The addresses are the same for "Medical Link Providers II, Inc." and "Medical Link Providers, Inc." Because the EIN and name differ and the date of incorporation varies from 1997 to 2001, however, more

¹ The petitioner's unaudited financial report will not be considered in lieu of its tax return pursuant to 8 C.F.R. § 204.5(g)(2).

evidence is required. If the petitioner underwent a restructuring, it would need to present evidence that its newly incorporated corporate identity is a successor-in-interest to its former corporate identity. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.